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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 CENTER FOR BIOLOGICAL  
11 DIVERSITY,

Plaintiff,

12 v.

13 UNITED STATES  
14 ENVIRONMENTAL PROTECTION  
15 AGENCY, et al.,

Defendants.

CASE NO. C13-1866JLR

ORDER DENYING MOTION TO  
INTERVENE

16  
17 **I. INTRODUCTION**

18 Before the court is the Western States Petroleum Association and the American  
19 Petroleum Institute's (collectively, "Proposed Intervenors") motion to intervene pursuant  
20 to Federal Rule of Civil Procedure 24. (*See* Mot. (Dkt. # 14).) In this case, Plaintiff  
21 Center for Biological Diversity ("CBD") challenges the United States Environmental  
22 Protection Agency's ("EPA") decision to approve Washington's and Oregon's lists of

1 “impaired waters” under Section 303(d) of the Clean Water Act, 33 U.S.C. 1313(d).  
 2 (*See generally* Compl. (Dkt. # 1).) CBD opposes the motion to intervene in its entirety;  
 3 Defendants oppose the motion to the extent it requests intervention as of right under  
 4 Federal Rule of Civil Procedure 24(a)(2). (*See* CBD Resp. (Dkt. # 18); EPA Resp. (Dkt.  
 5 # 19).) Having considered all submissions in favor of and against the motion, the  
 6 balance of the record, and the relevant law, and no party having requested oral argument,  
 7 the court denies the motion to intervene, but grants amicus curiae status to the Proposed  
 8 Intervenors.

## 9 **II. BACKGROUND**

### 10 **A. Clean Water Act**

11 Congress enacted the Clean Water Act (“CWA”) “to restore and maintain the  
 12 chemical, physical, and biological integrity of the Nation’s waters” and to attain “water  
 13 quality which provides for the protection and propagation of fish, shellfish, and wildlife.”  
 14 33 U.S.C. § 1251(a). The CWA prohibits discharges of pollutants from point sources  
 15 into water bodies absent compliance with a national pollution discharge elimination  
 16 system (“NPDES”) permit. 33 U.S.C. § 1311(a); 1362(12), (14). A NPDES permit  
 17 allows the holder to discharge pollutants at levels below thresholds incorporated in the  
 18 permit; a permit may include both technology-based and water quality criteria standards.  
 19 33 U.S.C. § 1311(b), 1342(a); 40 C.F.R. § 122.1 et seq. The states of Washington and  
 20 Oregon administer NPDES permits for point sources within their jurisdiction. *See*  
 21 *generally* Wash. Admin. Code 463-76-005 et seq.; Or. Admin. R. 340-041-0001 et seq.  
 22

### 1       **1. Water quality standards**

2       The CWA also requires each state to establish water quality standards for bodies  
3 of water within the state's boundaries. 33 U.S.C. § 1313(a)-(c). These standards  
4 include (1) designated beneficial uses for waters, (2) narrative and/or numeric water  
5 quality criteria, which define the amounts of pollutants permissible to maintain the  
6 designated beneficial uses, and (3) anti-degradation requirements, which protect existing  
7 in-stream uses and high quality waters. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.10-  
8 12.

### 9       **2. Section 303(d) list of impaired waters**

10       Section 303(d) of the CWA requires states to establish a list of impaired or  
11 threatened water bodies within their boundaries for which existing pollution controls are  
12 not stringent enough to meet the applicable water quality standards. 33 U.S.C.  
13 § 1313(d)(1); 40 C.F.R. § 130.7. States must submit this list every two years to EPA for  
14 approval; EPA must approve, disapprove, or partially disapprove a state's list within 30  
15 days of its submission. 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(2). If EPA  
16 disapproves a state's list, EPA must within 30 days of the date of disapproval establish a  
17 list of waters that should have been listed as impaired. 33 U.S.C. § 1313(d)(2); 40 C.F.R.  
18 § 130.7(d)(2). EPA must solicit and consider public comment on such listings. 40  
19 C.F.R. § 130.7(d)(2).

### 20       **3. Total maximum daily loads**

21       For waters listed as impaired on the section 303(d) list, the state must establish a  
22 total maximum daily load ("TMDL") for a pollutant "preventing or expected to prevent

attainment of water quality standards.” 40 C.F.R. § 130.7(c)(1)(ii); 33 U.S.C. § 1313(d)(1)(C). A TMDL defines the maximum amount of a pollutant that can be added to an impaired water body from all combined sources without exceeding water quality standards. *See Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995). EPA must approve or disapprove TMDLs established by states. 33 U.S.C. § 1313(d)(2). TMDLs themselves do not regulate specific sources of pollutants, but instead inform the design and implementation of other pollution control measures, such as individual discharge permits and state water quality management plans. *See Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002); 33 U.S.C. § 1313(e); 40 C.F.R. § 130.6.

#### **B. CBD’s Allegations**

Ocean acidification occurs when the chemistry of seawater is altered such that it becomes more acidic and its pH declines. (Compl. ¶ 40.) Absorption of carbon dioxide from the atmosphere is one cause of ocean acidification. (*Id.*) Ocean acidification can pose a threat to marine animals and ecosystems because, among other things, it impairs the ability of organisms, such as oysters and coral, to build calcium-carbonate-based shells and other skeletal structures. (*Id.* ¶ 50.) CBD alleges that Washington’s and Oregon’s coastal waters are especially vulnerable to ocean acidification. (*Id.* ¶ 43.)

Both Washington and Oregon have established water quality standards that are relevant to ocean acidification. (*Id.* ¶¶ 56-57, 67 (citing Wash. Admin. Code Ch. 173-201a; Or. Admin. R. Ch. 340-041).) CBD alleges that because Washington and Oregon’s ocean waters do not attain certain of these water quality standards, “each segment” of the

1 states' coastal waters should be included the states' respective Section 303(d) lists of  
2 impaired waters. (*Id.* ¶¶ 66, 75.)

3 EPA approved Washington's Section 303(d) list of impaired waters on December  
4 21, 2012, and Oregon's Section 303(d) list of impaired waters on December 14, 2012.  
5 (*Id.* ¶¶ 36, 39.) Neither of these lists identifies any coastal waters as threatened or  
6 impaired by ocean acidification. (*Id.* ¶¶ 34, 38.)

7 Accordingly, CBD filed this action requesting (1) a declaration that EPA's  
8 decision to approve Washington and Oregon's Section 303(d) lists of impaired waters  
9 was arbitrary and capricious and either (2) an order compelling EPA to disapprove of  
10 Washington and Oregon's lists and identify waters impaired by ocean acidification within  
11 30 days or (3) an order vacating and remanding the approvals to EPA for a new  
12 determination. (*Id.* § VIII.)

### 13 **C. Motion to Intervene**

14 The Western States Petroleum Association and the American Petroleum Institute  
15 (collectively, "Proposed Intervenors") now move to intervene in this action. (*See*  
16 *generally* Mot.) The Western States Petroleum Association is a non-profit private trade  
17 association that represents the interests of the petroleum and petroleum-products industry  
18 in Washington, Oregon, Arizona, California, Nevada, and Hawaii. (Holmes Dec. (Dkt.  
19 # 15).) The American Petroleum Institute is a national trade association representing  
20 over 500 member companies involved in all aspects of the oil and natural gas industry.  
21 (Schild Dec. (Dkt. # 17).) Both organizations include member companies who own and  
22 operate refineries in the State of Washington that discharge treated industrial wastewater

1 into marine waters pursuant to NPDES permits issued by the State of Washington.  
 2 (Holmes Dec. ¶¶ 5-7; Schild Dec. ¶¶ 3-5, Exs. A-D.) CBD opposes the Proposed  
 3 Intervenor's motion on all grounds; EPA opposes the Proposed Intervenor's attempt to  
 4 intervene as of right, but takes no position as to their request for permissive intervention.  
 5 (*See generally* CBD Resp.; EPA Resp.)

### 6 **III. ANALYSIS**

#### 7 **A. Intervention as of Right**

8 Intervention as of right is governed by Federal Rule of Civil Procedure 24(a)(2).

9 When analyzing a motion to intervene of right, courts apply a four-part test:

- 10 (1) the motion must be timely;
- 11 (2) the applicant must claim a "significantly protectable" interest relating to  
the property or transaction which is the subject of the action;
- 12 (3) the applicant must be so situated that the disposition of the action may  
as a practical matter impair or impede its ability to protect that interest; and
- 13 (4) the applicant's interest must be inadequately represented by the parties  
to the action.

14 *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011). On a motion  
 15 to intervene, a district court must accept as true the nonconclusory allegations of the  
 16 motion and proposed answer. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810,  
 17 819 (9th Cir. 2001). The Ninth Circuit construes Rule 24(a) liberally in favor of potential  
 18 intervenors. *California ex rel. Lockyer v. United States*, 450 F.3d 436, 440-41 (9th Cir.  
 19 2006). The party seeking to intervene bears the burden of showing that all of the  
 20 requirements for intervention have been met. *United States v. Alisal Water Corp.*, 370  
 21 F.3d 915, 919 (9th Cir. 2004).

Here, Plaintiff and Defendant do not challenge the timeliness of Proposed Intervenor's motion. (*See generally* CBD Resp.; EPA Resp.) However, as discussed in the following sections, Proposed Intervenor fails to establish a significantly protectable interest relating to the subject of the action such that the disposition of the action may impair its ability to protect that interest. Because Proposed Intervenor's bid for intervention as of right fails at the second and third elements, the court does not reach the fourth and final element of inadequate representation.

### **1. Significant protectable interest**

"An applicant has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *Lockyer*, 450 F.3d at 440-41 (quoting *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). To merit intervention as of right, the interest must be "direct, non-contingent, substantial and legally protectable." *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002), *modified by* 307 F.3d 943 (9th Cir. 2002) (quoting *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1157 (9th Cir. 1981)). There is a sufficient relationship between the interest and a plaintiff's claims if the "relief sought by the plaintiffs will have direct, immediate, and harmful effects upon a third party's legally protectable interests." *Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1494 (9th Cir. 1995), *abrogated by Wilderness Soc.*, 630 F.3d 1173.

A NPDES permit can be a significant protectable interest. *See Sierra Club v. EPA*, 995 F.2d 1478, 1486 (9th Cir. 1993) *abrogated by Wilderness Soc.*, 630 F.3d 1173

(finding that city could intervene in action seeking to compel EPA to establish new permits for city's wastewater treatment plants). However, unlike the underlying environmental action in *Sierra Club*, this action does not directly challenge any existing permit. (See Compl. ¶¶ 77-79 (Claims for Relief).) Instead, Proposed Intervenor argue that they have a significant protectable interest in this suit because some of their members will face various forms of stricter or additional regulation if CBD prevails. (Mot. at 6-9.) Proposed Intervenor claim that these members "would likely incur significant increased capital and operating costs necessary to comply" with these new regulatory requirements. (Holmes Dec. ¶¶ 8; *see also* Schild Dec. ¶¶ 6-10.) This court addressed—and rejected—a similar argument in this suit's predecessor, an action by CBD against EPA regarding the omission of coastal waters from Washington's 2008 Section 303(d) list. *See Center for Biological Diversity v. EPA*, Case No. 09-civ-0670-JCC (W.D. Wash., filed May 14, 2009) Dkt. # 29 (hereinafter "Previous Intervention Order"). Proposed Intervenor's current variations of this argument are likewise insufficient.

#### **a. TMDL**

Although Judge Coughenour dispensed with this theory in the predecessor lawsuit, Proposed Intervenor again argue that the TMDL requirement creates a significant, protectable interest in this action. (See Previous Intervention Order at 7; Mot. at 9 n.8.) This court agrees with Judge Coughenour that the TMDL requirement does not establish a direct, non-contingent interest that merits intervention as of right.

Proposed Intervenor's theory is that any revision of the Section 303(d) lists to include coastal waters will require the states to establish TMDLs and submit the TMDLs



1 to EPA for approval. *See* 40 C.F.R. § 130.7(c)(1)(ii); 33 U.S.C. § 1313(d). Once a  
2 TMDL is approved, it “serves as an informational tool or goal for the establishment of  
3 further pollution controls.” *City of Arcadia v. EPA*, 411 F.3d 1103, 1105 (9th Cir. 2005).  
4 According to Proposed Intervenor, a decrease in pollution limits in its members’ NPDES  
5 permits would then be imminent. (*See* Mot. at 9 n.8.)

6 Although it is true that, absent a finding that EPA’s approval of the list was  
7 arbitrary and capricious, Proposed Intervenor’s permits will likely remain the same, the  
8 connection between this lawsuit and any decrease in permit limits is too attenuated to  
9 satisfy Rule 24(a). *See Our Children’s Earth Found. v. EPA*, C 05-05184 WHA, 2006  
10 WL 1305223, at \*3 (N.D. Cal. May 11, 2006) (“Without a review process, of course, the  
11 standards will remain the same, thus preventing increases in pollution-control spending at  
12 refineries. The connection between this lawsuit and any potential increase is, however,  
13 too vague, attenuated and contingent to satisfy Rule 24(a).”) A TMDL “does not, by  
14 itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal  
15 that may be implemented by adjusting pollutant discharge requirements in individual  
16 NPDES permits or establishing nonpoint source controls.” *City of Arcadia v. EPA*, 265  
17 F. Supp. 2d 1142, 1144 (N.D. Cal. 2003). Although NPDES permits must, as a whole,  
18 contain limitations that are consistent with the wasteload allocations established in  
19 TMDLs, *see* 40 CFR §122.44(d)(1)(vii), the state retains discretion in determining how  
20 the pollutant load is allocated among the various sources that discharge into an impaired  
21 water. *See, e.g., Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002). As a result,  
22 several steps—steps that involve nebulous “goals” and the discretion of two public

1 agencies—lie between a listing of coastal waters and any permit restrictions imposed due  
2 to the TMDL requirement. *See* Previous Intervention Order at 5. This situation does not  
3 implicate the “direct, non-contingent” interest necessary to justify intervention as of right.  
4 *See S. Cal. Edison*, 307 F.3d at 803. Therefore, the court rejects this argument.

5 **b. Increased restrictions in reissued NPDES permits**

6 Proposed Intervenors next argue that, regardless of the development of a TMDL, a  
7 finding in CBD’s favor will necessarily tighten restrictions in their members’ future  
8 NPDES permits because the refineries will no longer be able to argue that certain coastal  
9 waters meet certain water quality standards applicable to ocean acidification. (Mot. at 6-  
10 9 and Reply (Dkt. # 20) at 2-4.) According to the CWA’s implementing regulations, each  
11 NPDES permit “shall include . . . any requirements in addition to or more stringent than  
12 promulgated effluent limitations guidelines . . . necessary to (1) achieve water quality  
13 standards . . . including State narrative criteria.” 40 CFR § 122.44(d)(1). Specifically,  
14 the limitations in a NPDES permit “must control all pollutants . . . which the Director  
15 determines are or may be discharged at a level which will . . . contribute to an excursion  
16 above any State water quality standard, including State narrative criteria for water  
17 quality.” *Id.* § 122.44(d)(1)(i). NPDES permits must be reissued at least every five  
18 years. *Id.* § 122.46(a). As such, although a finding of impairment would not  
19 immediately affect existing permits, upon reissuance the permit’s pollutant thresholds  
20 could potentially be revised downward to ensure the discharges do not contribute to  
21 excursions above certain water quality standards.  
22

1        However, the “possibility that this lawsuit could lead to more stringent regulations  
2 does not constitute a direct, substantial, legally protectable interest in this lawsuit.” *Ctr.*  
3 *for Biological Diversity v. EPA*, C-11-06059 YGR, 2012 WL 909831, at \*4 (N.D. Cal.  
4 Mar. 16, 2012). In *Center for Biological Diversity v. EPA*, the court found that the  
5 possibility that a suit to compel EPA to review Clean Air Act regulations “could lead to a  
6 process that may change those regulations creates, at best, a remote economic interest in  
7 this litigation. A remote interest does not provide for intervention as a matter of right.”  
8 *Id.* That same principle applies here. Revision of members’ permits, which will be  
9 determined not by this lawsuit but at the discretion of state and federal administrative  
10 agencies and via intervening regulatory processes, is too remote to merit intervention as  
11 of right.

12        Proposed Intervenor present a stylized example suggesting that, if for some  
13 reason EPA found that the existing average pH of Washington’s marine waters (currently  
14 8.1) was categorically unacceptable to meet water quality standards, all permits allowing  
15 discharges with a pH from 6.0-9.0 would have to be revised. (Mot. at 7.) The reality is  
16 not so clear-cut; Proposed Intervenor over-simplify both the science and the law. First,  
17 average pH is only one indicator of ocean acidification’s biological impacts; ocean  
18 acidification implicates numerous other water quality standards, including narrative water  
19 quality criteria. (See Compl. ¶¶ 56-57.) For that reason, adjusting the pH of discharge  
20 permits is but one of many ways in which ocean acidity can be improved and the effects  
21 of ocean acidification mitigated. (See CBD Resp. at 8 (listing remedies including  
22

1 programs to reduce land-based nutrient runoff and habitat management measures to  
2 buffer the impacts of ocean acidification).)

3       Second, it is not possible to predict whether a finding in CBD's favor on the merits  
4 of this action will lead to revisions in any particular NPDES permits. Upon a ruling that  
5 EPA's approval of the lists was arbitrary and capricious, CBD requests either an order for  
6 EPA to disapprove the lists and identify impaired coastal waters or a remand for EPA to  
7 reconsider the lists. (Compl. § VIII.) Either way, whether any given permit will be  
8 modified ultimately depends on a host of factors, including: which waters EPA  
9 determines are impaired, which water quality standards those waters fail to meet, which  
10 remedies state agencies choose to employ to address those standards, and, in the event  
11 permit modification is selected as a remedy, whether the state agency responsible for  
12 reissuing permits determines that an entity in fact discharges pollutants "at a level which  
13 will . . . contribute to an excursion above" the applicable state water quality standard, 40  
14 CFR §122.44(d)(1)(i). Due to these intervening administrative determinations, the relief  
15 sought by plaintiffs does not have the "direct, immediate" effects upon NPDES permits  
16 necessary to justify intervention as of right. *See Conservation Council*, 66 F.3d 1494.

17       Not only that, but as of now, every entity that possesses a permit to discharge into  
18 Washington or Oregon's coastal waters faces the same theoretical possibility that a chain  
19 of regulatory events occurring after the conclusion of this suit could lead to modifications  
20 of their permits upon reissuance. "[A]n undifferentiated, generalized interest in the  
21 outcome of an ongoing action is too porous a foundation on which to premise  
22 intervention as of right." *S. California Edison*, 307 F.3d at 803 (quoting *Pub. Serv. Co.*

1 of *N.H. v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998)); *see also ManaSota-88, Inc. v.*  
 2 *Tidwell*, 896 F.2d 1318, 1322 (11th Cir. 1990) (finding that the “generalized grievance”  
 3 of industry members facing potential permit modifications did not constitute a  
 4 significantly protectable interest in a suit to force EPA to list impaired waters). Here,  
 5 Proposed Intervenor’s generalized interests in avoiding potentially stricter NPDES permit  
 6 limitations are simply too remote from the substance of this litigation to merit  
 7 intervention as of right. *See Or. Env’tl. Council v. Or. Dep’t of Env’tl. Quality*, 775 F.  
 8 Supp. 353, 358 (D. Or. 1991) (finding that regulated entities’ economic interests were not  
 9 directly related to suit seeking an order requiring state to comply with Clean Air Act  
 10 implementation plan when granting permits).

### 11 **c. Conditions in existing NPDES permits**

12 Proposed Intervenor’s also contend that including coastal waters on the Section  
 13 303(d) list will trigger stricter provisions in some members’ existing permits. (Reply at  
 14 2-3.) Specifically, one member’s general permit for discharge of construction stormwater  
 15 provides that “operators of construction sites that discharge to a 303(d)-listed water body  
 16 are not eligible for coverage under this permit *unless* the operator” shows either that (i)  
 17 the stormwater was not exposed to any pollutant for which the water is listed as impaired;  
 18 (ii) the pollutants for which the water body is impaired are not present at the site; or (iii)  
 19 for non-TMDL listed waters, the new discharge meets water quality standards at the point  
 20 of discharge. (Phillips 66 Permit (Dkt. # 17-3) at 22-23 (emphasis in original).)  
 21 Proposed Intervenor’s argue that their member has a significantly protectable interest in  
 22 avoiding these additional conditions. (Reply at 2-3.) Assuming that a wish to avoid

1 complying with existing permit restrictions constitutes a significant interest protectable  
 2 under law, Proposed Intervenor overlook that the permit also provides:

3 All references and requirements associated with Section 303(d) of the  
 4 Clean Water Act mean the most current listing by Ecology of impaired  
 5 waters (Category 5) that exists on January 1, 2011, or the date when the  
 operator's complete permit application is received by Ecology, whichever  
 is later.

6 (*Id.* at 22.) The permit was issued December 1, 2010. (*Id.* at 1.) Because any listing of  
 7 coastal waters initiated by this lawsuit would necessarily occur after January 1, 2011, and  
 8 after the date of the complete permit application, it does not appear that the listing would  
 9 work any immediate change to the regulated entity's status under the terms of the  
 10 permit.<sup>1</sup> As such, this provision does not establish a significantly protectable interest.<sup>2</sup>

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13  
 14 <sup>1</sup> To the extent that a listing of impaired coastal waters would, due to a permittee's inability to  
 15 meet the three conditions, necessitate an application for a new permit, such concerns are addressed in the  
 preceding Section III(A)(1)(b).

16 <sup>2</sup> In the event that the restrictive conditions in members' permits can in fact be triggered by  
 17 impaired listings made after January 2011, Proposed Intervenor have not carried their burden to make a  
 18 compelling showing that EPA's representation of this interest would be inadequate. The "most important  
 factor in determining the adequacy of representation is how the [applicant's] interest compares with the  
 interests of existing parties." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). "When an  
 applicant for intervention and an existing party have the same ultimate objective, a presumption of  
 adequacy of representation arises," and a compelling showing is required to demonstrate inadequate  
 representation. *Id.*

19 When it comes to avoiding restrictive conditions in existing permits, Proposed Intervenor's  
 20 ultimate objective is aligned with EPA's ultimate objective, namely, to uphold EPA's approval of  
 Washington's and Oregon's Section 303(d) impaired waters list. Proposed Intervenor insist they have a  
 21 "significantly different" perspective from EPA (Mot. at 12), but make no showing that EPA is unwilling  
 or incapable of fully defending its decision to approve the Section 303(d) lists. The court is not required  
 22 to accept conclusory allegations contained in applicants' motion to intervene. *Sw. Ctr. for Biological  
 Diversity*, 268 F.3d at 819. For this reason, also, conditions in existing permits are not a basis for  
 granting intervention as of right.

**d. Carbon dioxide emissions regulation**

Proposed Intervenor argue that CBD's ultimate goal is to use a Section 303(d) listing of coastal waters to pursue the establishment of a TMDL for airborne carbon dioxide emissions. (Mot. at 10.) The recent establishment of a TMDL program for mercury emissions in the northeastern United States, as well as CBD's statements in its complaint, response brief, and letters to EPA, lend credence to that assertion. (*See* Compl. ¶¶ 40-41, 49, 54; CBD Comment Letter (Dkt. # 16-1) at 11; CBD Resp. at 8.) Proposed Intervenor argue that their constituents, as members of the oil, natural gas, and petroleum industries, have an economic interest in avoiding carbon dioxide emission regulations in any form. (Holmes Dec. ¶ 9; Schild Dec. ¶ 8.)

Be that as it may, any such eventual regulation falls outside the scope of this litigation. Plaintiff's requested relief implicates only EPA's decision to approve Washington and Oregon's Section 303(d) lists. (*See* Compl. § VII.) The question of which remedies should be applied to impaired coastal waters (to the extent any waters are found to be impaired) will rest squarely with the states' regulatory agencies. As discussed above, the states have at their disposal numerous regulatory tools for addressing impairment, and regulation of airborne pollutants is by no means the most obvious or likely. (*See* CBD Resp. at 8 (listing possible mechanisms for combating ocean acidification).) To the extent it is CBD's end game to pursue a TMDL for carbon dioxide emissions, that is a game that will be played on a different field. Proposed Intervenor's concerns about future regulation of carbon dioxide emissions are too

speculative—and too tangentially related to the merits of this action—to justify intervention as of right. *See Ctr. for Biological Diversity*, 2012 WL 909831, at \*4.

### e. Value of Real Property

Proposed Intervenor argue briefly that a finding that EPA was arbitrary and capricious to approve Section 303(d) lists that do not include impaired coastal waters will lead to a decline in value of their members' real property. Proposed Intervenor provide no explanation as to why such a decision would affect the value of the land on which their members' refineries are located, and they identify no other specific property that is in jeopardy. On its face, this does not appear to be a situation in which an adverse ruling will impair or restrict the use of the property at issue—in fact, the suit does not concern the members' refinery property at all, but rather nearby water bodies. The only evidence that Proposed Intervenor supply in support of their argument is a single sentence asserting that: “These regulatory consequences, and the associated economic impacts, may also have significant adverse impacts to the value of the real properties owned by API members and from which wastewater discharges occur.”<sup>3</sup> (Schild Dec. ¶ 6; *see also* Holmes Dec. ¶ 8); *but see Barnum Timber Co. v. EPA*, 633 F.3d 894, 898 (9th Cir. 2011) (finding that timber operator had standing to challenge a Section 303(d) listing because forestry experts testified that the listing restricted timber operations and reduced property value). Absent even a minimal showing of a negative effect on real property, the court

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<sup>3</sup> Proposed Intervenor also cite to declarations stating that the refineries will incur increased costs of compliance if their permits are modified. (Mot. at 10). These costs are subsumed in Proposed Intervenor's arguments regarding the financial burden of more restrictive permits address previously in Section III(A)(1)(a),(b).



1 finds Proposed Intervenor's cited authority inapposite, and rejects this argument as a  
2 ground for finding a protectable interest.

3 Having reached the last of Proposed Intervenor's arguments, the court finds that  
4 Proposed Intervenor fails to establish a significantly protectable interest in the substance  
5 of this litigation.

## 6 **2. Disposition of action may impair ability to protect interest**

7 Even if Proposed Intervenor had established a significantly protectable interest  
8 predicated upon their NPDES permits, disposition of this case without the Proposed  
9 Intervenor would not as a practical matter impair their ability to protect those interests.  
10 *See Wilderness Soc.*, 630 F.3d at 1177. In *Our Children's Earth Foundation v. EPA*, the  
11 court denied intervention by regulated entities in a suit seeking to force EPA to review  
12 Clean Air Act regulations. *See* 2006 WL 1305223, at \*3. The applicants for intervention  
13 were concerned about the development of more restrictive permits, but because the  
14 "substantive content of any new regulations [was not] a subject of this lawsuit," the court  
15 found that the applicants "may adequately protect their members' financial interests by  
16 advocating for less stringent standards *during the EPA rule-making process itself.*" *Id.*  
17 (emphasis in original). So, too, here, the substantive content of Proposed Intervenor's  
18 permits is not a subject of this lawsuit, and Proposed Intervenor can adequately protect  
19 their members' interests during subsequent regulatory processes.

20 Specifically, in the event the matter is remanded to EPA for EPA to make a new  
21 determination or to list impaired waters, any EPA proposal to list additional waters would  
22 be subject to public notice and comment, a process in which Proposed Intervenor could

1 fully participate. *See* 40 C.F.R. § 130.7(d)(2). If additional waters were listed as  
2 impaired, Proposed Intervenors could then also participate in the state's development of a  
3 TMDL for those waters. *See* 40 C.F.R. § 130.7(c)(1)(ii) (requiring that calculations to  
4 establish TMDLs shall be subject to public review consistent with the state's continuing  
5 planning process); *see e.g.*, Or. Admin. R. § 540-042-0050 (establishing public notice and  
6 comment during development of TMDLs).

7       Regarding the restrictions in NPDES permits, both Washington and Oregon  
8 provide for public notice and comment prior to reissuance of permits. *See, e.g.*, Wash.  
9 Admin. Code § 173-220-050 (establishing public notice and 30-day written comment  
10 period for individual NPDES permits), § 173-220-090 (establishing that applicants for  
11 individual NPDES permits can request a public hearing), § 173-220-180 (establishing  
12 that the notice and comment procedures are applicable to replacement of existing  
13 individual permits), § 173-220-225 (establishing appeal process for individual NPDES  
14 permits), § 173-226-130 (establishing public notice and written comment period for  
15 general NPDES permits), § 463-76-041 (establishing public notice and comment for  
16 NPDES permits issued to energy facilities); Or. Admin. R. § 340-045-0027 (establishing  
17 various amounts of public notice and participation regarding the issuance and renewal of  
18 individual NPDES permits), § 340-045-0033(4) (establishing public notice and  
19 participation procedures prior to issuing general permits). Proposed Intervenors (or their  
20 members) are free to argue their case for less restrictive permits at that time, as well.

21       In short, the third element of the Rule 24(a) test is not met because Proposed  
22 Intervenors remain free to advance their members' economic and regulatory interests in

future administrative processes that more directly address those interests. Because Proposed Intervenor fail to show the second and third elements of the Rule 24(a) test, the court DENIES Proposed Intervenor's motion for intervention as of right.

#### **B. Permissive Intervention**

An applicant who seeks permissive intervention must prove that it meets three threshold requirements: (1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims.<sup>4</sup> *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998); Fed. R. Civ. P. 24(b). Even where all the prerequisites are met, a district court has considerable discretion to deny the motion. *Donnelly*, 159 F.3d at 412. "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3); *see also Donnelly*, 159 F.3d at 412. In addition, the court also should consider whether the interests of the proposed intervenor are adequately represented in the proceedings already. *Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989). The court may also consider whether the party seeking intervention will significantly contribute to the just and equitable adjudication of the legal issues presented. *See Spangler v. Pasadena Bd. of Educ.*, 552 F.2d 1326, 1329 (citing *Hines v. Rapides Parish Sch. Bd.*, 479 F.2d 762, 765

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<sup>4</sup> "Where the proposed intervenor in a federal-question case brings no new claims, the jurisdictional concern drops away." *Freedom from Religious Foundation, Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011).

1 (5th Cir. 1973)). “Finally, judicial economy is a relevant consideration in deciding a  
2 motion for permissive intervention.” *Id.* at 531.

3 Here, assuming that Proposed Intervenors establish the two applicable threshold  
4 requirements for permissive intervention, practical considerations militate against  
5 permissive intervention. The court finds that Proposed Intervenors’ interests are  
6 adequately represented in this litigation without formal intervention. Proposed  
7 Intervenors have not demonstrated that EPA is incapable or unwilling to make all  
8 available arguments in support of their common objectives, or that the applicants will  
9 contribute some element necessary to the adjudication of this case that would otherwise  
10 be omitted. *See Or. Envtl. Council*, 775 F. Supp. at 359. To the extent that the Proposed  
11 Intervenors seek to litigate the issue of whether EPA has complied with its duties under  
12 the CWA, EPA is in a better position to raise arguments about its own compliance. *See*  
13 *Ctr. for Biological Diversity*, 2012 WL 909831, at \*7. Although the Proposed  
14 Intervenors may have a unique point of view, intervention as a party will not necessarily  
15 facilitate resolution on the merits, but is likely to result in duplicative briefing adding a  
16 layer of unwarranted procedural complexity. *See Drakes Bay Oyster Co. v. Salazar*, 12-  
17 CV-06134-YGR, 2013 WL 451813, at \*9 (N.D. Cal. Feb. 4, 2013). For these reasons,  
18 the court DENIES the Proposed Intervenors’ motion for permissive intervention.

19 **C. Amicus Status**

20 Although the Proposed Intervenors have not so moved, the court has “broad  
21 discretion” to appoint amicus curiae. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th cir.  
22 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). Because

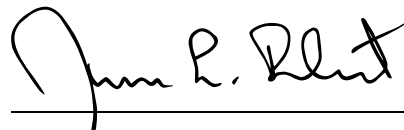
1 Proposed Intervenors have expressed a concerted interest in this litigation, and because  
2 Proposed Intervenors believe that they have a unique perspective that may otherwise not  
3 be represented in this litigation, the court grants Proposed Intervenors amicus curiae  
4 status.

5 In the absence of local rules governing the role of amicus curiae, the court will  
6 adhere to the applicable rules found in the Federal Rules of Appellate Procedure.  
7 Accordingly, the Proposed Intervenors must file any memorandum commenting on a  
8 party's memorandum no later than seven days after the party's principal brief is filed.  
9 *See* Fed. R. App. P. 29(e). Any amicus curiae brief filed by Proposed Intervenors will be  
10 limited to no more than one-half the maximum length authorized by this court's local  
11 rules for a party's principal brief. *See* Fed. R. App. P. 29(d); *see also* Local Rules W.D.  
12 Wash. LCR 7(e). The Proposed Intervenors shall not file reply memoranda or participate  
13 in oral argument unless authorized in advance by the court. *See* Fed. R. App. P. 29(f),  
14 (g).

#### 15 IV. CONCLUSION

16 For the foregoing reasons, the court DENIES the Proposed Intervenors' motion to  
17 intervene (Dkt. # 14), but GRANTS the Proposed Intervenors amicus curiae status.

18 Dated this 18th day of February, 2014.

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20   
21 JAMES L. ROBART  
22 United States District Judge